

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 19**

**SUNSTEEL, LLC**

**Employer**

**And**

**Case 19-RC-261739**

**IRON WORKERS DISTRICT COUNCIL OF THE  
PACIFIC NORTHWEST, AFL-CIO**

**Petitioner**

**DECISION AND DIRECTION OF ELECTION**

The petition in this matter was filed by Iron Workers District Council of the Pacific Northwest, AFL-CIO ("Petitioner") on June 16, 2020.<sup>1</sup> By its petition, Petitioner seeks to represent certain employees of SunSteel, LLC ("Employer") as the collective bargaining representative of approximately 135 production and maintenance employees of the Employer at its Sunnyside, Washington, facility.

The only matter at issue is whether the election should be conducted by manual or mail ballot method. Election arrangements, including the voting method, are not litigable matters at a pre-election hearing, but the positions of the parties are considered. On July 8, the parties entered into a stipulated record in lieu of a hearing, agreeing to submit their positions to me on the voting method and details of election.<sup>2</sup> Both parties submitted their arguments on July 16.

Based on the stipulated record, consideration of the circumstances present, and the parties' arguments, I conclude that a mail ballot election is appropriate in the instant case due to the extraordinary circumstances presented by the COVID-19 pandemic in Yakima County, where the Sunnyside facility is located. I have ordered an election accordingly.

***BACKGROUND***

To date, the current COVID-19 pandemic has resulted in approximately 42,000 cases and 1,400 deaths in Washington. As with many states, Washington put in place strict quarantine measures as the pandemic initially spread, followed by a loosening of restrictions, and then, recently, new restrictions to slow the resurgent spread of infection.

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<sup>1</sup> All dates 2020 unless otherwise indicated.

<sup>2</sup> As part of the stipulated record, the parties have resolved all eligibility questions consistent with the method approved by the National Labor Relations Board in *Norris-Thermador Corp.*, 119 NLRB 1301 (1958). *National Labor Relations Board Casehandling Manual Part Two Representation Proceedings*, § 11084.4. The stipulated record contains a list of all eligible voters, including a single voter the parties agree is to vote subject to challenge due to contested supervisory status. I have ordered an election consistent with this agreement.

When the current pandemic began in March, Washington issued stay-at-home orders and other quarantine procedures that resulted in the temporary closure of many businesses, as well as restrictions on when and where residents could congregate. As the rate of infection began to fall in May, Washington's Governor instituted a four-step phased reopening plan to reduce the limitations on businesses and residents.<sup>3</sup> Under the plan, counties could apply and, if certain benchmarks were met, the state would approve the transition to a new, less-restrictive, phase.

Phase 1 is the first step following full quarantine procedures, and it is the most restrictive. For residents, it allows outdoor recreation and outdoor spiritual or religious services, but almost all indoor and group activities remain prohibited.<sup>4</sup> For businesses, existing construction can resume, as well as some outdoor services such as landscaping. Only curb-side pick-up is allowed for retail businesses, and indoor seating is prohibited at restaurants. As counties entered phase 1 but had not yet met the criteria for phase 2, minor adjustments were made in the phase 1 criteria on a county by county basis, referred to as "phase 1.5" or "modified phase 1."

Yakima County, where the Sunnyside facility is located, has been severely impacted by the current pandemic. To date, the approximately 8,300 cases in Yakima County are second most in Washington, behind only King County.<sup>5</sup> Although King County has a population almost 10 times larger than that of Yakima County, King County has reported approximately 12,200 cases. The outsized impact of the pandemic on Yakima County has been reflected in the strain on its health care infrastructure. On June 19, the Yakima Health District issued a press release announcing that Yakima County hospitals were currently exceeding capacity.<sup>6</sup> Yakima County is currently in phase 1 of Washington's reopening plan, although with some adjustments consistent with phase 1.5.<sup>7</sup>

In late-June and early-July Washington reported that COVID-19 cases were again increasing statewide. Although 34 counties in Washington had progressed to phase 2 and 3 of the reopening plan, effective July 2, Governor Inslee paused further progression, until at least July 28, due to the resurgent number of cases throughout the state. On July 7, the Governor also issued an order requiring employers to provide face coverings to employees, and for businesses to require the use of face coverings of all customers and visitors.<sup>8</sup> The Washington Department of Health additionally ordered, on June 26, that all individuals wear a face covering in any indoor public setting or when outdoors and unable to maintain proper social distancing. On July 16, the Governor issued additional orders limiting gatherings to no more than 5 people in counties in Phase 2 or modified Phase 1 and no more than 10 people in counties in Phase 3.

Sunnyside is essentially equidistant from the Regional Office of the National Labor Relations Board ("Board") in Seattle, Washington, 177 miles, and the Board's Resident Agent in Spokane, Washington, 184 miles.

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<sup>3</sup> <https://coronavirus.wa.gov/what-you-need-know/county-status-and-safe-start-application-process>

<sup>4</sup> <https://coronavirus.wa.gov/what-you-need-know/safe-start/whats-open-each-phase#Phase1>

<sup>5</sup> <https://www.doh.wa.gov/Emergencies/NovelCoronavirusOutbreak2020COVID19/DataDashboard>

<sup>6</sup> <https://www.yakimacounty.us/DocumentCenter/View/25049/61920-Yakima-County-Hospitals-Exceeding-Capacity>

<sup>7</sup> <https://www.yakimacounty.us/DocumentCenter/View/25277/Clarification-on-Yakima-Countys-Modified-Phase-1-Press-Release>

<sup>8</sup> <https://coronavirus.wa.gov/information-for/you-and-your-family/face-masks-or-cloth-face-covering>

## **POSITIONS OF THE PARTIES**

Petitioner argues a mail ballot election is appropriate due to the extraordinary circumstances presented by the high rates of COVID-19 infection in Yakima County generally, and among the Employer's workforce specifically. Regarding the rate of infection in Yakima County, Petitioner cites to the same statistics described above, noting that residents of Yakima County account for twenty percent of all COVID-19 cases in Washington, while the county contains only 3.2 percent of the state's population. Petitioner also asserts that 22 of the Employer's employees have tested positive for COVID-19 during the pandemic, and that the outbreak at the facility was severe enough to lead to a four-day closure of the Sunnyside facility beginning on June 29.

The Employer maintains a manual election should take place consistent with the Board's longstanding preference for this manner of election. The Employer argues that mail ballot elections diminish voter turnout generally, but also that mail ballot elections ordered during the current pandemic have resulted in even lower participation rates. The Employer also argues that because the voters are not "scattered," in time or place, and no strike or lockdown is taking place, extraordinary circumstances are not present.

The Employer does not address the impact of COVID-19 on its workforce specifically, or the closure Petitioner asserts recently occurred. It maintains a safe manual election could be conducted either in the cafeteria of the Sunnyside facility, or in an outdoor canopy. The Employer maintains that either option would allow:

1. a separate entrance for voters to enter and exit, with markings to depict safe traffic flow throughout polling area;
2. a release time voting schedule;
3. accommodation of social distancing requirements, which the Employer will mark on the floor;
4. sufficient space to have separate tables spaced six feet apart so Board Agent, observers, ballot booth and ballot box are at least six feet apart;
5. space for the Employer to provide plexiglass barriers of sufficient size to protect the observers and Board Agent, to separate observers and the Board Agent from voters and each other, pre-election conference and ballot count attendees; and
6. cleaning consistent with CDC guidelines.

The Employer has also committed to providing enough disposable pencils without erasers for each voter to mark their ballot, and glue sticks or tape to seal challenge ballot envelopes. The Employer maintains the above is consistent with the recent directions from the General Counsel of the National Labor Relations Board ("General Counsel") regarding manual election protocols, discussed below.

## **BOARD'S STANDARD**

Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives, and the Board in turn has delegated the discretion to determine the arrangements for an election to Regional Directors. *San Diego Gas and Elec.*, 325 NLRB 1143, 1144 (1998); citing *Halliburton Services*, 265 NLRB 1154 (1982); *National Van Lines*,

120 NLRB 1343, 1346 (1958); *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). This discretion includes the ability to direct a mail ballot election where appropriate. *San Diego Gas & Elec.* at 1144-1145. Whatever decision a Regional Director does make should not be overturned unless a clear abuse of discretion is shown. *National Van Lines* at 1346.

The Board's longstanding policy is that elections should, as a rule, be conducted manually. *National Labor Relations Board Casehandling Manual Part Two Representation Proceedings*, Sec. 11301.2. However, a Regional Director may reasonably conclude, based on circumstances tending to make voting in a manual election difficult, to conduct an election by mail ballot. *Id.* This includes a few specific situations addressed by the Board, including where voters are "scattered" over a wide geographic area, "scattered" in time due to employee schedules, in strike situations, or other extraordinary circumstances. *San Diego Gas*, *supra* at 1145.

On May 8, the Board, in an Order denying a request for review in *Atlas Pacific Engineering Company*, Case 27-RC-258742, addressed a mail ballot determination in the context of the COVID-19 pandemic. In its footnote to that Order, the Board noted that *San Diego Gas* contemplated "extraordinary circumstances" beyond the considerations described above, and that circumstances in place at the time – federal, state, and local government directives limiting nonessential travel, requiring the closure of nonessential businesses, and the Regional office conducting the election on mandatory telework – constituted a valid basis for directing a mail ballot election in that case after considering the conditions surrounding a manual election.

On July 6, the General Counsel issued a memorandum titled "Suggested Manual Election Protocols." *Memorandum GC 20-10*. In that memo the General Counsel reiterated that Regional Director's have the authority, delegated by the Board, to make "initial decisions about when, how, and in what manner all elections are conducted." The General Counsel further noted Regional Directors have, and will:

make these decisions on a case-by-case basis, considering numerous variables, including, but not limited to, the safety of Board Agents and participants when conducting the election, the size of the proposed bargaining unit, the location of the election, the staff required to operate the election, and the status of pandemic outbreak in the election locality.

The memorandum then addressed suggested election mechanics, certifications and notifications required to verify a safe election can occur, and the need to include election arrangements in an election agreement. The memo concludes with additional notes regarding the assignment and travel of Board Agents.

### ***A MAIL BALLOT ELECTION IS APPROPRIATE***

Whether a mail ballot election is appropriate in this case requires considering both the public health concerns presented by the COVID-19 pandemic and the Board's stated preference for manual elections. Without addressing the specific statistics posited by the Employer regarding participation in mail ballot elections during the pandemic, I recognize that mail ballot elections may result in lower voter participation. I also recognize that the Board has at times in the past addressed potential problems that may be associated with mail ballot elections. While I do not discount these concerns, these concerns are the basis for the Board's traditional preference for manual elections, and absent the current pandemic I would order a manual election in this case because, as the Employer argues, employees

are not “scattered.” I only direct a mail ballot election here because of the extraordinary circumstances presented by the COVID-19 pandemic.

I find a mail ballot election is appropriate in this case because of the severity of the current pandemic in Yakima County. It is not hyperbole to state, when relative population is considered, Yakima County is the most severely impacted of Washington’s 39 counties. Yakima County is one of only a few counties in Washington that was unable to progress out of phase 1 of reopening, and it remains a county subject to the strictest limitations on gatherings, social contact, and travel. While the current situation may not be as dire as a few weeks prior, when local hospitals exceeded their capacity, the point remains that COVID-19 is significantly impacting the residents of Yakima County and remains a serious health concern throughout the community. Here, directing a manual election would be to require a gathering of a relatively large group of voters in a community with widespread COVID-19 transmission. Indeed, based on the Governor’s most recent order, it appears no more than 5 individuals should be congregating at any time.

Further, Washington in general is experiencing a trend of increasing COVID-19 infection. This increase raises the possibility that, if I order a manual election, I will be directing voters and others to congregate under circumstances more dire than those faced today. A mail ballot election avoids this risk. I additionally note that due to the distance from the Regional Office or Resident Agent, a manual election would require significant travel by the Board Agent conducting the election.

In finding that a mail ballot election is appropriate I do not rely on Petitioner’s contention regarding the number of employees that have had COVID-19, or that the Employer shut down its facility for several days as a result. Unlike the statistics I have cited above, published by the State of Washington, I do not have a basis for assessing these specific factual contentions about the Sunnyside facility. If the question of whether to direct a mail or manual election were closer, it might be necessary to explore these specific facts further. However, given the severity of the outbreak in Yakima County generally, and because even the safest manual election still involves physical interactions, congregating, and an increased risk of transmission, I find extraordinary circumstances are present that make a mail ballot election necessary.

Finally, I note that the General Counsel’s “Suggested Manual Election Protocols” memo provides guidance on how to safely conduct a manual election when and if a manual election is deemed appropriate. It is not a checklist whereby a party is entitled to a manual election if it can meet these requirements. The manner of election is a question of discretion delegated by the Board to the Regional Directors. While I do not necessarily find fault with the Employer’s proposal, procedures like social distancing and plexiglass shields are tools to mitigate the risk of transmission. When an area is experiencing the spread of pandemic disease to the extent of Yakima County simply mitigating the risk may not be the best course of action. I find in these circumstances it is appropriate to use the procedure that avoids the risks associated with in-person contact: the mail ballot procedure. Under the present circumstances I find it prudent to order a mail ballot election.

## **CONCLUSIONS**

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.<sup>9</sup>

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

**Included:** All full-time and regular part-time production, maintenance, shipping, receiving and plant clerical employees including but not limited to: Welders, Fitters, Fitter/Welders, Painters, Yardmen, Machine Operators, Crane Operators, Material Handlers, Quality Control, Dimensional Checkers, Shipping Assistants, Tool Crib Attendants, Maintenance, Janitors, and Leadmen employed at or from the employer's Sunnyside, Washington facility.

**Excluded:** All other employees, including office clerical, professionals, guards, managers, and supervisors as defined in the Act.

#### **DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by **IRON WORKERS DISTRICT COUNCIL OF THE PACIFIC NORTHWEST, AFL-CIO**.

##### **A. Election Details**

The election will be conducted by mail. On **Thursday, August 6, 2020**, the ballots will be mailed to voters by a designated official from the National Labor Relations Board, Region 19. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by **Thursday, August 13, 2020**, should communicate immediately with the National Labor Relations Board by either calling the Region 19 Office at **206-220-6300** or our national toll-free line at **1-866-667-NLRB (1-866-667-6572)**.

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 19 office by **12:00 p.m. (noon) PST on Thursday, August 27, 2020**. Pursuant to the parties' Stipulation, no ballots will be counted that are received after

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<sup>9</sup> During the hearing the parties stipulated to the following commerce facts:

The Employer, a State of Delaware corporation, with a place of business in Sunnyside, WA, is engaged in the business of steel fabrication. In the past twelve months, a representative period, the Employer has purchased and received goods valued in excess of \$50,000 directly from points outside the State of Washington. Accordingly, the Employer is engaged in commerce within the meaning of the Act and is subject to the jurisdiction of the Board. The Employer is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

the due date. All ballots will be commingled and counted by an agent of Region 19 of the National Labor Relations Board on **Monday, August 31, 2020 at 1:00 p.m.** with participants being present via electronic means. No party may make a video or audio recording or save any image of the ballot count. If, at a later date, it is determined that a ballot count can be safely held in the Regional Office, the Region will inform the parties with sufficient notice so that they may attend.

### **B. Voting Eligibility**

Those eligible to vote in the election are employees in the above unit who were employed during the payroll period ending **July 4, 2020**, including employees who did not work during that period because they were ill, on vacation, or were temporarily laid off. The stipulated record in this case contains, by mutual agreement of the parties, a list of all eligible voters. Consistent with that list, one voter in the quality control classification will vote subject to challenge due to disputed supervisory status.

Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, employees engaged in an economic strike which commenced less than 12 months before the election date, who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Employees who are otherwise eligible but who are in the military services of the United States may vote if they appear in person at the polls or by mail as described above.

Ineligible to vote are (1) employees who have quit or been discharged for cause after the designated payroll period for eligibility, (2) employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and (3) employees engaged in an economic strike which began more than 12 months before the election date who have been permanently replaced.

### **C. Voter List**

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the Regional Director and the parties by **July 23, 2020**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at [www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015](http://www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015).

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at [www.nlr.gov](http://www.nlr.gov). Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

#### **D. Posting of Notices of Election**

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. A Spanish-language version of the Notice of Election will be sent by the Region separately. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

#### **RIGHT TO REQUEST REVIEW**

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board. A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to [www.nlr.gov](http://www.nlr.gov), select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review. A request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and therefore the issue under review remains unresolved, all ballots will be impounded.



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Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated at Seattle, Washington on the 21<sup>st</sup> day of July, 2020.

*Ronald K. Hooks*

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